UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

D. HAYGOOD, Petitioner, v. JAMES WALKER, Warden, Respondent.	)	Case No. 08cv0374-JAH (BLM) **REPORT AND RECOMMENDATION FOR ORDER DISMISSING FIRST AMENDED PETITION WITHOUT PREJUDICE**

This Report and Recommendation is submitted to United States District Judge John A. Houston pursuant to 28 U.S.C. § 636(b) and Local Civil Rules 72.1(d) and HC.2 of the United States District Court for the Southern District of California.

DISCUSSION

On April 1, 2008, Petitioner Darrow Haygood, a state prisoner appearing *pro se* and *in forma pauperis*, filed the First Amended Petition for Writ of Habeas Corpus ("FAP") currently before the Court. Doc. No. 4. In its April 10, 2008 Notice Regarding Possible Dismissal of Petition for Failure to Exhaust State Court Remedies ("Options Order"), this Court informed Petitioner that he had failed to allege exhaustion as to claims 1, 2, 4 and 6 of the FAP. Doc.

No. 7. In the same order, this Court informed Petitioner of four options he might elect to pursue in order to cure his failure to satisfy the exhaustion requirement. Id. Petitioner was directed to elect one of the options and file the appropriate briefing on or before May 13, 2008. Id. The Court warned Petitioner that failure to respond to the Court's Options Order would result in this Court recommending to the District Judge that the Petition be dismissed without prejudice. Id. at 4.

Petitioner has not responded in any manner to this Court's Options Order. As this Court explained to Petitioner in its Options Order, exhaustion is required by 28 U.S.C. § 2254(b), which states:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
>
> (A) **the applicant has exhausted the remedies available in the courts of the State**; or
>
> (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b) (emphasis added). The Supreme Court has construed this to be a "total exhaustion rule" and, therefore, held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." Rose v. Lundy, 455 U.S. 509, 522 (1982); Rhines v. Weber, 544 U.S. 269, 276-77 (2005) (confirming continued applicability of "total exhaustion rule" even after AEDPA imposed one-year statute of limitations on habeas claims). Because the FAP contains both unexhausted and exhausted claims and because Petitioner has failed to pursue any available option for remedying his mixed FAP, this Court **RECOMMENDS** that the FAP be **DISMISSED**

WITHOUT PREJUDICE[1].

CONCLUSION AND RECOMMENDATION

For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and dismissing this action in its entirety without prejudice.

IT IS ORDERED that no later than **June 13, 2008**, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **July 3, 2008**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

DATED: May 22, 2008

BARBARA L. MAJOR
United States Magistrate Judge

COPY TO:

HONORABLE JOHN A. HOUSTON
UNITED STATES DISTRICT JUDGE

ALL COUNSEL AND PARTIES

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[1] As this Court warned Petitioner in the Options Order, although the Court recommends dismissal without prejudice, Petitioner is cautioned that any later federal petition may be barred by the statute of limitations. See 28 U.S.C. § 2244(d)(1)-(2) (imposing a one-year period of limitation to applications for writ of habeas corpus).